U.S. Job Losses Exceeds Great Recession

The U.S. is in a severe recession caused by the sudden shutdown due to the COVID-19 pandemic. Since the lockdown began, the nation has lost 21.4 million jobs. Employers cut 881,000 in March and another 20.5 million in April, the largest one-month loss in the nation's history. Losses already exceed those of the Great Recession, in which 8.7 million Americans were laid off. Data on claims for unemployment insurance (UI) through mid-May show the losses continue to mount. As of May 9, over 36.5 million Americans had filed for benefits. When the Bureau of Labor Statistics (BLS) releases its May jobs report (scheduled for June 5), losses will likely exceed 25.0 million jobs. That equates to roughly one in every six U.S. workers being laid off or furloughed. "No doubt employers have every intention of bringing back workers once the immediate crisis passes, but the indefinite nature of this pandemic coupled with the fact that we're seeing recession- or even depression-level economic data means the vast majority of these jobs will not return any time soon," said Andrew Challenger, Senior Vice President of Challenger, Gray & Christmas, Inc. "The longer people are out of work, the less money they have to spend. The longer people feel unsafe going out and spending, the less likely many small and midsize businesses will keep people on the payroll," he added. The vast majority of cuts came from companies in the Entertainment/Leisure sector, which includes bars, restaurants, hotels, and amusement parks. Retailers have announced the second-highest number of job cuts this year. Millions of other laid-off workers didn't look for a new job in April, likely discouraged by their prospects in a mostly shuttered economy, and weren't included, either. If all those people had been counted as unemployed, the jobless rate would have reached nearly 24%. Most economists have forecast that the official unemployment rate could hit 18% or higher in May before potentially declining by summer. The bulk of the job losses will occur over three to four months, the recovery, however, may take years. Assume a hypothetical scenario where the nation's job losses top 28 million before the pandemic subsides and the economy reopens. Assume the nation quickly recoups 75 percent of those job losses within 12 months. That still leaves 7 million Americans without work. Prior to the pandemic, the nation created jobs at the rate of 200K a month. If the U.S. can return to that pace, based on the above assumptions, a full jobs recovery would be four years away from the point at which at which the recovery begins.

U.S. Unemployment Rate

Initial jobless claims increased by 2.98 million in the week of May 3 to May 9, the government said Thursday, marking the eighth week in a row in which they've risen by at least an approximate 3 million. More than 36 million people have applied for jobless benefits since the pandemic struck two months ago, including self-employed workers and independent contractors made eligible for the very first time under a federal relief program. Some 33 million have applied under existing state unemployment laws, while at least 3 million have filed claims under the federal government's Pandemic Unemployment Assistance Program. Not all of these employees are still out of work. Some have been called back to their jobs in industries deemed essential. Others have returned to their jobs as many states reopen parts of their economies, particularly in less populated areas where the coronavirus is mostly absent. The states of California, Texas, Georgia, Florida, and New York reported the biggest increases in new claims, according to the Labor Department. California, the largest U.S. state, has received the most jobless claims overall. The unemployment rate climbed to 14.7 percent in April, a level not seen

since the Great Depression. If not for errors in data collection, the rate would have been much higher. The unemployment rate is based on a survey of households. During April, surveyors were instructed to classify people not working due to the coronavirus as "unemployed on temporary layoff." Instead, most were classified as "employed but absent from work." This misclassification skewed the unemployment downward. If the miscounted workers had been classified properly as "unemployed," the rate would have been closer to 20 percent. Layoffs due to COVID-19 fell heaviest on the young, the less educated, and minorities. The unemployment rates for all groups, except for blacks, were the highest on record.

Unemployment by Demographic or Education

GROUP	% UNEMPLOYED MARCH	% UNEMPLOYED APRIL
DEMOGRAPHIC		
All workers	4.4	14.7
Adult Men	3.7	12.4
Adult Women	3.6	15.0
Teenagers	12.5	31.2
Whites	4.0	14.2
Blacks	6.7	16.7
Hispanics	6.0	18.9
Asians	4.1	14.5
EDUCATIONAL ATTAINMENT	6.8	21.2
Less than H.S. Diploma	4.4	17.3
H.S. Graduate	3.7	15.0
Bachelor's Degree or Higher	2.5	8.4

Source: U.S. Bureau of Labor Statistics

In late April, the Congressional Budget Office forecast the U.S. unemployment rate will remain stubbornly high through the end of '21. One possible bright spot in the April data is that 75 percent of the unemployed considered their situation temporary and expect to return to work soon. How soon depends on how well employers, consumers and policy makers manage the reopening of the economy. Another sign of hope, initial claims for unemployment insurance have been trending down, suggesting the worst of the layoffs are over. Just as individuals with pre-existing health conditions are most at risk of dying from the virus, businesses with preexisting financial conditions may never reopen. COVID-19 will hasten the demise of brick and mortar retailers. Restaurants already have high failure rates. The two account for 37.6 percent of U.S. job losses to date. Small businesses typically operate on thin margins. Without federal assistance—the equivalent of a financial ventilator—many will not recover. Small business account for roughly one third of all U.S. jobs. U.S. unemployment is expected to hit 17% in June as the economy contracts due to efforts to contain the coronavirus pandemic, economists predicted, and the economy is expected to start rebounding in the second half of the year.

Sharply Lower Growth in the Current Quarter, Followed by Recovery

With many economic activities halted because of the COVID-19 pandemic, the near-term outlook for the U.S. economy looks much weaker now than it did three months ago, according to 42 forecasters surveyed by the Federal Reserve Bank of Philadelphia. The forecasters predict the economy will contract at an annual rate of 32.2 percent this quarter. However, the panel

sees recovery over each of the next four quarters. On an annual-average over annual-average basis, the forecasters expect real GDP to decrease 5.6 percent this year but to recover and grow at an annual rate of between 2.2 percent to 4.1 percent over each of the following three years. A sharp upward revision to the forecast for the unemployment rate accompanies the outlook for growth. The forecasters predict unemployment will be above 10.0 percent in each of the next three quarters. In the survey of three months ago, the unemployment rate was expected to stay below 4.0 percent in each of the same three quarters. On an annual-average basis, the panelists predict the unemployment rate will decline from 10.8 percent in 2020 to 5.1 percent in 2023. On the employment front, the forecasters see job losses in the current quarter at a rate of 7,647,800 per month. The recovery in the labor market will begin in the third quarter of 2020, with job gains of 2,328,900 per month.

Parcel Carriers Expanded Payrolls as Homebound Consumers Shopped Online

Package-delivery companies added jobs last month as homebound consumers ramped up online purchases amid a crumbling U.S. employment market. Courier and messenger companies that deliver to homes and businesses added 1,800 jobs in April. It was the only industry in the transportation and warehousing sector where payrolls expanded in a month when coronavirus lockdowns cost the economy a record 20.5 million jobs. The hiring among parcel carriers comes as the pandemic accelerates the shift to e-commerce. United Parcel Service Inc. said home deliveries spiked nearly 70% by the end of March, with drivers making 15% more stops on their daily routes. Last month, online giant Amazon.com Inc. reported a 26% jump in quarterly sales as its world-wide shipping costs hit $10.9 billion, a 49% increase from the year-earlier period. Overall U.S. e-commerce sales rose 49% in April compared to a March 1 to March 11 baseline, according to Adobe Analytics. Job cuts across other logistics operations reflected a contracting economy as businesses deemed nonessential halted operations to help limit the spread of the virus. Trucking companies slashed 88,300 jobs in April as a jump in business moving food and medical supplies failed to compensate for plunging demand from closed industrial and retail customers. Warehousing and storage operators shed 74,100 jobs, nearly 10 times the number cut at the industry's January 2009 low point. Last month's nosedive in hiring came even though Amazon and Walmart Inc. recruited heavily to staff their online fulfillment centers to meet the surging demand. Essential businesses such as medical and food suppliers are still increasing their warehouse staff, with hiring demand in those areas up 10% to 20% since the pandemic hit. And companies deemed nonessential will also be hiring as some states begin to lift restrictions.

Texas Unemployment Rate & Job Loss Percentage Will Likely Mirror U.S.

More than 1.8 million workers in Texas have filed initial claims for unemployment insurance since mid-March. Though claims peaked in early April, they remain elevated as the Texas Workforce Commission (TWC) struggles to process a backlog of applications. Employment data for the state and its 25 metro areas won't be released until May 22, but unemployment rates and job loss percentages will likely mirror that of the U.S. Texas UI data suggests every sector has lost jobs, the greatest losses occurring with hotel, restaurants, and bars; retail trade; and health care. Closure mandates have forced the retailers and restaurants to lay off staff. Health care has suffered from declines in routine care visits and cancellations of elective procedures. The Federal Reserve Bank of Dallas conducts monthly surveys of Texas manufacturing, service, and retail sectors, and compares the current month's result to the previous month's results. In April, 81.9 percent of respondents reported general business conditions had worsened compared to March, 73.5 percent reported a decrease in revenues, and 73.0 percent replied their company's near-term outlook had worsened. The Dallas Fed expects Texas will underperform the U.S. in output and job growth this year due to the state's outsized share of vulnerable industries, such as

food services and air transportation, as well as prolonged weakness in oil and gas. Employment will contract sharply through midyear, predicts the Fed, then rebound in the second half of '20. However, the year will end with employment down 7.6 percent from last year's level. The energy industry is in a world of hurt, compounding the state's financial problems. According to researchers at the Federal Reserve Bank of Dallas, "Economic distress caused by the COVID-19 pandemic has sent the Texas economy into a tailspin." "I don't think I've used that word in years, probably a decade, said Laila Assanie, a senior economist. Indeed, the last time Texas employment declined from December to December was in the wake of the Great Recession. In 2009, nonfarm jobs fell 3.5 percent, the U.S. Bureau of Labor Statistics notes. This year's decline is projected to be more than twice as deep – down 7.6 percent by the end of the year, the Dallas Fed said. With about 13 million workers at the end of 2019, Texas is expected to lose more than 983,000 jobs for the year. And that is after a rebound in hiring in the second half. "The gains will not be enough to offset the losses," Assanie said. One key reason: "We don't know how many workers will actually be called back," she said. Layoffs already have been widespread, and the depth of the damage was reflected in the jobless numbers released. To identify the hardest-hit sectors in Texas, Assanie tallied state unemployment claims as a share of sector employment. From March 7 to April 25, more than 20 percent of workers in arts and recreation and in lodging and food services has claimed unemployment benefits. Other services, which include repair, maintenance, and nail and hair salons, also had a high share of unemployment filers – as did mining, education and retail trade. Assanie said the filings are likely to grow as the state processes more claims for people who've lost their jobs. In Texas and elsewhere, unemployment offices have been swamped by the demand for benefits. For many holding on to their jobs, the pay is getting lower. In a survey of Texas companies last month, a quarter of employers said they had reduced salaries, and the share was higher among service companies and retailers. Many also reported cutting work hours. "That's how they're preserving cash, and It's not just a handful of companies," Assanie said. The federal relief bill includes an extra $600 a week in unemployment benefits through July. Some workers are realizing they can make more from unemployment than from their old jobs, wrote one responded to the Dallas Fed survey. "This could be a problem down the road, driving wage increases," an executive from a professional services company said.

Every Sector in Houston Has Lost Jobs

Nearly 380,000 Houstonians have filed for unemployment insurance between March 21 and May 2. Sectors with the most claims include full-service restaurants, offices of dentists, temporary help services, department stores, and limited-service restaurants. Local claims will likely top 400,000 by the end of May. Houston's unemployment rate will mirror the national rate, hitting the mid-teens in April and possibly reaching 20 percent in May. Every sector has lost jobs, with hotels, restaurants, and bars; health services; and retail among the hardest hit. Nationwide, energy (exploration and production, support services for mining) has cut about 45,000 jobs since the downturn began. Those loses will accelerate in coming months. Of the 150 sectors and subsectors for which BLS reports data, only six recorded gains. Those included courier services, computer manufacturing, federal government, monetary authorities (i.e., the U.S. Federal Reserve), other information services (i.e., the internet), and general merchandise stores (e.g., Target, Wal-Mart).

Net U.S. Job Losses Due to COVID-19 Pandemic

Sector	000s	% Lost Since Feb '20
Total Payroll Employment	-21,418.0	-14.0
Goods-producing	-2,429.0	-11.1
Mining and Logging	-57.0	-7.1
Oil and gas extraction	-4.8	-3.1
Support activities for mining	-40.0	-10.8
Construction	-1,008.0	-13.2
Manufacturing	-1,364.0	-10.6
Durable goods	-934.0	-11.6
Nondurable goods	-430.0	-9.0
Petroleum and coal products	-9.3	-8.1
Chemical	-31.9	-3.7
Services Providing		
Wholesale trade	-365.7	-6.2
Durable goods	-181.6	-5.6
Nondurable goods	-154.5	-7.1
Retail trade	-2,151.7	-13.7
Transportation	-591.3	-10.2
Utilities	-3.0	-0.5
Information	-258.0	-8.9
Financial activities	-265.0	-3.0
Finance and insurance	-35.3	-0.5
Real estate	-103.5	-5.9
Professional and business svcs	-2,245.0	-10.4
Education and health svcs	-2,645.0	-10.8
Educational services	-494.0	-12.9
Health care	-1,474.8	-8.9
Leisure and hospitality	-8,152.0	-48.3
Arts, entertainment, and recreation	-1,348.0	-54.5
Food services and drinking places	-5,918.8	-48.1
Other Services	-1,305.0	-22.0
Government	-1,008.0	-4.4

Note: Numbers may not sum due to rounding errors and intentional omissions

Chemicals and Refining - Chemical railcar loadings, the best real-time indicator of U.S. chemical industry activity, were down 10.2 percent for the week ending May 9 compared to the same week last year. Metro Houston accounts for over 40 percent of the nation's base petrochemical capacity. U.S. refineries typically run at 90 percent or more of their design capacity. Refinery utilization hit 94.5 percent the last week of December but dropped to 67.6 percent in mid April. The rate ticked up to 70.5 in early May as many states began the process of reopening their economies giving a nudge to gasoline demand. Regular gasoline along the U.S. Gulf Coast averaged $1.50 per gallon the week ending May 11, down from $2.52 per the same week last year. Low crude oil prices, record-high inventories, and weak demand should hold gasoline prices near their current levels over the next several months.

Transportation - Through March of this year, the four Houston area ports (Freeport, Galveston, Houston and Texas City) handled 64.0 million metric tons of cargo, up 5.5 million tons (9.4 percent) from 58.8 million over the compatible period last year. The growth is not sustainable, however, because the jump included an 8.7 million ton

increase in crude and refined product shipments. The surge more than offset declines in other commodities. Once April data is available, it's likely to show flat or declining overall shipments. April data is already available for container traffic at the Port of Houston. Port facilities handled 24,439 fewer containers in April '20 compared to April '19, an 11.7 percent drop. The Houston Airport System handled 58 percent fewer passengers in March '20 than in March '19. Most of the two-million-plus passengers traveled in the first half of the month. Data from the Transportation Safety Administration (TSA) shows that U.S. air passenger volumes are down 90 percent since early March.

Construction - Dodge Data & Analytics reports that Houston-area starts totaled $5.1 billion through March of this year, up $247 million, 5.1 percent, over the comparable period in '19. That suggests that construction, one of the sectors deemed essential by the Department of Homeland Security, has fared well during the pandemic. In a nationwide survey, 38 respondents reported they had at least one project already under way that was halted in March; 31 percent reported projects halted in April.

Residential Real Estate - Prior to the COVID-19 pandemic, sales of single-family homes, duplexes, townhomes, condos outpaced last year's record volume as consumers took advantage of historically low interest rates. April was a different story, however. Sales of existing homes slipped 21.6 percent and the dollar value fell 20.4 percent. New homes sales are faring better, with local builders reporting an uptick in traffic through model homes, steady sales, and fewer cancellations. Historically low interest rates continue to drive sales. And the perception that new homes, (i.e., never been lived in) are safer than resale homes has helped drive demand. The outbreak has begun to affect the multi-family sector. Rents for Class A properties slipped $37 and Class B properties $9 in May. Typically, the market sees an uptick in rents in the spring and summer.

Energy Outlook - The oil markets have begun the slow and painful recovery process from the collapse brought on by the COVID-19 pandemic. At the peak, 4 billion people lived under some form of restriction or isolation, according to the International Energy Agency (IEA). Since mid-April, 65 countries have reopened. IEA expects the number of people living under restrictions should drop to 2.8 billion by the end of May. Another 85 countries will ease restrictions in June. World markets have begun to see a dramatic drop in supply. Prior to COVID-19, the world consumed approximately 100 million barrels of crude per day IEA expects crude demand to average 79.3 million barrels in Q2. As people leave their homes and return to work, the markets, to restaurants and cafes, the demand for transportation fuels will rise. The agency forecasts crude demand to reach 95.1 million barrels per day in Q3, and 96.9 million in Q4. That's likely overoptimistic, however, given the slow pace at which the economy is reopening. Lower prices have forced a dramatic reduction in supply. Companies and countries have shut-in production. IEA estimates daily global output fell almost 12 million barrels in March, led by cuts in U.S., Canadian, OPEC and Russian production. Rystad Energy estimates U.S. production cuts may reach two million barrels per day (bpd) by June. That would be a nearly 15 percent drop in output since January

Manufacturing - Economic activity in the manufacturing sector contracted in April, and the overall economy contracted after 131 consecutive months of expansion, say the nation's supply executives in the latest Manufacturing ISM® *Report On Business®*. The April PMI® registered 41.5 percent, down 7.6 percentage points from the March reading of 49.1 percent. The coronavirus pandemic and global energy market weakness continue to impact all manufacturing sectors for the second straight month. Among the six big industry sectors, Food, Beverage & Tobacco Products remains the strongest. Transportation Equipment and Fabricated Metal Products are the weakest of the big six sectors. Of the 18 manufacturing industries, the two that reported growth in April are:

Paper Products; and Food, Beverage & Tobacco Products. The 15 industries reporting contraction in April, in order, are: Printing & Related Support Activities; Furniture & Related Products; Transportation Equipment; Textile Mills; Fabricated Metal Products; Nonmetallic Mineral Products; Machinery; Plastics & Rubber Products; Electrical Equipment, Appliances & Components; Petroleum & Coal Products; Wood Products; Miscellaneous Manufacturing; Computer & Electronic Products; Primary Metals; and Chemical Products.

Companies Move to Enhance Health Care and Wellbeing Programs in Response to COVID-19

Companies are making enhancements to their health care, wellbeing and leave programs, according to a new Willis Towers Watson survey examining the business impact of COVID-19 on health benefits. The survey, conducted from April 20 – 23, found that nearly half of respondents (47%) are enhancing health care benefits, 45% are broadening wellbeing programs, and 33% plan to make changes to paid time off (PTO) or vacation programs. And while some companies are reducing costs in other ways — furloughs, pay cuts and reductions in 401(k) matching contributions — many are preserving wellbeing plans at a time when employees are facing significant challenges. "Although most employers anticipate a significant negative impact from COVID-19, many are taking steps to protect the health and wellbeing of their employees," said Regina Ihrke, senior director and wellbeing leader, North America, Willis Towers Watson. "Employers are doing what they can to support their workers through this difficult time. The pandemic has led to high levels of employee anxiety and stress, so employers are making it easier for employees to get help across all aspects of the wellbeing spectrum." Supporting physical and emotional health is a top priority for most employers as 64% believe COVID-19 will have a moderate to large impact on employee wellbeing. More than three in four (77%) are offering or expanding access to virtual mental health services. Maintaining physical health is also important with 60% of employers offering new easy-to-implement virtual solutions such as virtual workouts to support employees who work from home. Another 19% are planning or considering these solutions. Half (50%) promote healthy nutrition and weight management for at-home employees, and 25% are planning or considering adding these programs. The survey found a majority of employers don't expect their health care benefit costs to rise substantially. Fifty-seven percent of respondents anticipate a small to moderate increase in costs, 24% expect no increase or decrease, and only 3% expect a large increase. A separate Willis Towers Watson actuarial analysis found employer health care benefit costs could fall by as much as 4.5% this year as demand for nonessential medical care has declined during the COVID-19 crisis. Over six in 10 (61%) employers have made or will make changes to their benefit programs over the next six months with two out of five (38%) planning to revise their health care strategies for 2021. Employers are also prepared to help employees with COVID-19-related costs. Seventy percent have waived telehealth costs, 69% have expanded reimbursements for over-the-counter drug costs through flexible spending accounts or health reimbursement arrangements, and 62% have waived or reduced COVID-19 treatment costs. When it comes to leave programs, 42% of employers have made or are planning to make changes to PTO, vacation and sick-day programs to enhance employee flexibility and lessen the buildup of accrued days by year-end. To minimize lost days, 24% of employers are planning to increase carryover limits, and 21% are allowing negative balances. Sixteen percent require employees to take PTO or vacation time to reduce year-end buildup, and 22% are planning or considering this requirement. Due to the COVID-19 pandemic, 12% are allowing donation to other employees, and 15% are planning or considering a donation program. "Leave policies have become incredibly important to those employees juggling new work arrangements and family situations such as children being home from school," said Rachael McCann, senior director, Health and Benefits, Willis Towers Watson. "Employers recognize that these programs are relatively easy and inexpensive to change and generate a great deal of goodwill. By taking positive actions around health, wellbeing and leave, employers are putting people first. And that is an investment that's likely to build employee loyalty, raise engagement and enhance future productivity."

Recalling Furloughed Employees and the Rehire Process

After COVID-19 abates, employers may determine that they cannot return all employees to the workforce. Some employers may need to recall employees on a slower timeline depending on demand, social distancing imperatives, and the timeline for production. Others may want to recall everyone, but may need to evaluate the terms of employment. When evaluating these issues, employers should consider their obligations under their agreements and policies, including any collective bargaining agreements. Also potentially significant will be the provisions of the federal Worker Adjustment and Retraining Notification (WARN) Act, and similar state and local laws, with regard to when and under what circumstances temporary furloughs become employment losses that can trigger advance notice and/or severance pay obligations. Employers should also consider potential adverse impact issues when selecting who to return from furlough. Some employees may express hesitation to return to work before a vaccine is widely available. In addition, employers should remain cognizant of their obligations under the Americans with Disabilities Act to discuss potential reasonable accommodation of employees with disabilities. Further, employers should be aware that employees who return from furlough can become eligible (potentially immediately) for paid leaves under the Families First Coronavirus Response Act and other similar state statutes.

Recall or Rehire Paperwork

When preparing to return employees from furlough, employers will want to identify the paperwork that needs to be completed to return employees to work. To determine the documentation needed with employees returning from furlough, the employer first should review the length of a furlough. It is generally recommended that employers refresh their hiring paperwork for employees returning from a furlough of *six months or more*. Note that this is "rule of thumb" guidance, rather than a fixed rule. Note also that this will not be appropriate in all cases, particularly if the employer is relying on continued furlough status (beyond six months) to avoid triggering an "employment loss" for WARN Act purposes. If the furlough lasted fewer than six months, employers should review the particular circumstances of the furlough – whether there are indicators that the employer and employees intended employment to continue, or whether it appears that the employer's or employee's intent was to sever the employment relationship – in determining whether it is appropriate to treat the recalled employee as a new hire for paperwork purposes. It is recommended that employers provide all returning employees a recall letter at least a week or more in advance of their return to work with a date by which the employee must respond to the employer regarding their intention to return to work. We anticipate that some employees may have found other employment or relocated during the COVID-19 pandemic. Providing these letters a week or more in advance will assist the employer and employees in planning for return.

Background Check Upon Return From Furlough

At the time of recall, some employers will be required to rerun background checks due to legal or customer obligations. Some employers may desire to rerun background checks for other reasons. Before ordering a background check report from a background check company for a recalled employee, the employer must ensure that it has a valid authorization for the background check from the employee. Background check authorizations drafted in recent years often include "evergreen language," providing that consent is given for the employer to run a background check at any point during the employment relationship. Before rerunning background checks, employers should review the authorization and corresponding documents, especially the requisite disclosure about the intention to obtain a background check, to help ensure the documents satisfy current legal standards and have evergreen language. If the

authorization on file does not have evergreen language, or appears outdated, an employer must obtain a new authorization. *Employers should update these documents with the assistance of counsel if there is any question whether the employer's documents have been updated recently.* As a reminder, if the employer does run a background check at the time of recall, the employer cannot simply choose not to recall the employee if the background check shows adverse information. *The employer must provide notice in accordance with applicable law, including the federal Fair Credit Reporting Act (FCRA) and any "ban the box" laws*. Because of potential delays in running background checks, employers that are not required to run background checks, but prefer to do so, should include language in offer letters or recall letters providing that the employee receiving the offer is being hired or recalled provisionally. This language can replace the typical language stating that employment will not start until the results of the background check are obtained, given the anticipated backlog.

Drug Tests Upon Recall From Furlough

Generally, it is unnecessary to "update" pre-hire drug tests upon return from furlough. Employers wishing to conduct drug tests of returning workers who were furloughed (with ongoing employment), should first check their policies and local law. Some employer policies allow for tests of workers who have been on leave or otherwise not working for a certain period of time, but most do not. If that is the case, a policy update may be needed. State and local drug-testing laws also may limit or prohibit tests of current employees on a suspicionless basis, even if the employee has been on leave and away for work for some time. In contrast, workers in roles subject to mandatory drug testing – for example, tests required by the U.S. Department of Transportation (DOT) – may need an updated "pre-hire" drug test, or, if they were selected for random testing while on furlough, may need to be sent for a random test upon their return to performing safety-sensitive covered work. If the employee was removed from the company's random testing pool while on furlough for a period of at least 30 days, a new DOT pre-hire test may be required.

Re-Performing I-9 Checks

If a furlough was treated as leave and as if employment continued, and the employee had a reasonable expectation of employment at all times, employers can continue to use the I-9 form that the employee completed at the beginning of employment. If the employees were placed in terminated status, however, an employer can either re-verify the I-9 or complete a new I-9. If the employee was in terminated status, and completed their I-9 more than three years prior to the rehire date, the employer must have the employee complete a new I-9 form. The U.S. Citizenship and Immigration Services (USCIS) website provides guidance on each of these situations. Because situations and workplaces vary, employers beginning the process of recalling employees from furlough should consult counsel.

Handling Concerns About Hesitant or "High-Risk" Employees

As jurisdictions across the country are gradually easing up on stringent business closures and similar restrictions, employers and workers are understandably eager to resume operations and reclaim some sense of "normalcy." Yet employers that are open, or are preparing to reopen, may be confronted with a new dilemma: employees who are hesitant to return to work. Some workers may be reluctant—or even decline—to return to the workplace because of health conditions, concerns about a family member's health, or childcare obligations. On the flip side, employers may question whether it is safe for certain employees to return. This article addresses the leave and accommodation aspects of these increasingly common but thorny scenarios.

What if employees are fearful of leaving their homes because they are considered to be among those with a higher risk of severe illness due to COVID-19?

If an employee cannot work (either at the worksite or remotely) or is limited in their ability to work because of an underlying health condition, the Americans with Disabilities Act (ADA) or the Family and Medical Leave Act (FMLA), as well as similar state or local laws, likely protect the employee. Therefore, if an employee requests to remain at home or refuses to return to work because of their condition, an employer should treat that request or refusal as a request for accommodation under the ADA and equivalent state or local laws. Such a request triggers the employer's obligation to engage the employee in the interactive process.

When engaging in the interactive process, employers should be mindful that some orders and public health guidance related to returning employees to work may require that employees who are part of the "high-risk" population be afforded specific accommodation(s). By way of example, in Colorado, employers must "provide work accommodations to Vulnerable Individuals, who remain subject to Stay at Home advisement, prioritizing telecommuting, as Vulnerable Individuals shall not be compelled to go to work during the pendency of this pandemic emergency." In Alaska, non-public-facing businesses are required to provide a "high-risk employee…an alternative workspace and/or special accommodations at the employee's request to avoid contact with, and mitigate the risk of, the employee's exposure to colleagues and others at the business." Prior to the COVID-19 pandemic, an employer could rely reasonably on the ability to seek documentation during the interactive process for disabilities that were not obvious. During the pandemic, however, there may be limits on an employer's ability to seek documentation or other information from a health care provider in order to verify an employee's job-related restrictions and/or need for accommodation. Moreover, any request for documentation or information from health care providers may be delayed due to restricted access employees may have to health care providers during the pandemic. As a result, employers need to be flexible with regard to their expectations about, and engagement in, the interactive process. They also must keep up-to-date on any specific return to work requirements imposed by these orders and public health guidance that may change, which would impact an employer's approach to the interactive process with employees. Ultimately, if there are no reasonable accommodations that enable the employee to return to work and the employee cannot perform their essential job functions remotely, the employee may qualify for FMLA (or an equivalent state or local law) if they meet the law's eligibility criteria and their condition is an FMLA-qualifying "serious health condition." Assuming an employee meets the eligibility criteria, the employer must analyze on a case-by-case basis whether the employee has a "serious health condition" for which leave can be taken. Given potential limited access to a health care provider, an employer may also need to approach certification deadlines with more flexibility by allowing a longer period for submitting certification. In addition, employees of businesses with fewer than 500 employees may also qualify for two workweeks of emergency paid sick leave (EPSL) under the Families First Coronavirus Response Act (FFCRA). Under the FFCRA, a health care provider must advise that the employee quarantine or self-isolate because they are particularly vulnerable to COVID-19, but no documentation from a health care provider can be required. Rather, the employee must only affirm that a health care provider advised them to quarantine or self-isolate. If an employee seeks EPSL for this reason, the employee is eligible to receive EPSL paid at 100% of the employee's regular rate or the applicable minimum wage (whichever is higher), up to a cap of $511/day or $5,110 total. Per IRS guidance, an employer will receive a dollar of tax credit toward its payroll tax obligation for every dollar it pays the employee in EPSL benefit.

What if employees do not want to leave their homes because they live with or are in contact with family members who are considered to be among those with a higher risk of severe illness due to COVID-19?

Under the ADA and applicable state and local disability laws, an employer's obligation to reasonably accommodate an employee is limited to accommodating an employee whose own health condition limits their ability to perform the essential functions of their job. There are, however, some laws that permit employees time off to care for a family member who is ill. More specifically, the FMLA and its state or local law equivalents provide employees with protected time off to care for certain family members who are ill or need health care-related treatment. An employee's eligibility for time off for a family member's "serious health condition" must be evaluated on a case-by-case basis, just as must be done for the employee's own condition. In addition, mandatory paid sick and safe time (PSST) laws also allow an employee protected time off from work to care for a family member. During the COVID-19 pandemic, some enforcement agencies have indicated that they construe their respective PSST laws as permitting an employee to take PSST to care for a family member who has heightened vulnerability to COVID-19 (rather than actually being ill with COVID-19). Further, a number of PSST laws that existed pre-COVID-19 include a protection for public health emergency (PHE) absences. Because of the pandemic, some PSST laws have been interpreted to extend protection for a COVID-19 PHE absence and others have been amended to protect certain PHE absences. Likewise, a number of jurisdictions have enacted new emergency PHE laws or executive orders in response to COVID-19. Though these laws vary as to scope and the ability to use other paid time off benefits toward an employer's legal obligation, they all uniformly provide protection to an employee wishing to take time off to care for a family member. Because of the unprecedented nature of these laws, it remains to be seen how broadly enforcement agencies will interpret "caring for a family member. "In contrast to an employer's ability to seek documentation of the need for reasonable accommodation or even FMLA and equivalent state and local law leaves in "normal" times, many PSST laws have always prohibited seeking documentation of the need for leave or limited the circumstances under which documentation can be requested. Further, it is common for the new PHE laws to prohibit employers from requesting documentation substantiating an employee's need for leave. To the extent that an employee is not covered by FMLA (or state and local law equivalents), PSST and/or PHE laws, but wants to avoid the workplace out of a general fear of being exposed to the virus and potentially infecting a family member, such absences are not necessarily protected by more generally applicable laws. However, executive orders and/or the accompanying public health guidance issued may require more flexibility in this regard, as well. In addition, employers need to be mindful that any actions taken with respect to an employee who refuses to return to work for safety-related reasons not run afoul of any anti-retaliation statute. Therefore, an employer should review the various laws providing protected time off to care for a family member and consult any applicable orders or public health guidance, which may indicate an obligation to accommodate or a preference for permitting telework where possible. This exercise helps avoid any erroneous assumption that an employee need not be accommodated in their request to remain off work or to work from home because of their association with a family member who is at higher risk of COVID-19 infection.

What if employees state they cannot return because of childcare obligations?

Under the FFCRA, employees may be entitled to protected time off and pay because a child's school or place of care is closed or their childcare provider is unavailable. The FFCRA provides two forms of protection for this purpose. First, an employee may be eligible for leave through EPSL. Second, an employee may also be eligible for leave through the Emergency Family and Medical Leave Expansion Act (EFMLEA). As discussed above, EPSL provides for up to two weeks of time off. Unlike situations where

EPSL is taken for the employee's own health-related situation, EPSL taken to address childcare obligations is paid at two-thirds the employee's regular rate or applicable minimum wage (whichever is higher), up to a cap of $200/day or $2,000 total. In addition, the EFMLEA provides employees up to 12 work weeks of leave. The first two weeks of leave are unpaid (unless the employee elects to use EPSL or other paid time off the employee may have available). The last 10 weeks are paid at two-thirds the employee's regular rate or applicable minimum wage (whichever is higher) up to a cap of $200/day or $10,000 total. Similarly, a number of PSST and PHE laws protect an employee's absence from work (and provide pay) because of the closure of a child's school or place of care due to a public health emergency. In addition, there are a few jurisdictions with "predictive scheduling" types of laws requiring an employer to engage in an interactive-process-like discussion with an employee about family care obligations and a flexible work schedule arrangement. This includes, for example, the Los Angeles Mayor's COVID-19 Order pertaining to grocery, drug retail and food delivery workers and guidance issued by both New York City and Seattle, Washington regarding their predictable scheduling laws, as well as previously existing "family-friendly workplace" laws in Berkeley and San Francisco, California. Finally, employers should consult orders and public health guidance to determine whether childcare obligations arising out of the COVID-19 pandemic will need to be accommodated.

Can an employer require employees who are at higher risk of severe illness due to COVID-19 to remain at home or otherwise prevent such employees from returning to work to protect them?

Excluding employees from the workplace based on a protected class, even if well intentioned and done to protect employees, is risky and may constitute unlawful discrimination. The U.S. Supreme Court has determined that excluding employees from the workplace based upon a protected category is discriminatory, even if intended to protect employees. In *United Automobile Workers v. Johnson Controls*, 499 U.S. 187 (1991), the U.S. Supreme Court held that excluding women with childbearing capacity from lead-exposed jobs was discriminatory, even though the company's policy was adopted to protect fetuses. In particular, the Court found that this policy or practice could not be justified as a *bona fide* occupational qualification (BFOQ). While the concept of BFOQ does not apply directly to disability discrimination claims, the logic applied in *Johnson Controls* may well extend to a disability discrimination situation. More specifically, just because an employee with an underlying medical condition may be at higher risk of severe illness due to COVID-19 does not mean that the employee cannot perform the essential functions of their job or that they pose a direct threat to the health and safety of themselves or others. As such, an employer that may merely wish to protect its vulnerable employees with certain underlying medical conditions (whom the ADA and other applicable disability laws likely protect) should not bar those employees from returning to the workplace or from resuming work outside their homes. Of course, if an employee in a vulnerable category can work remotely, then an employer may offer telework as an option. If such employees cannot work remotely and want to return to work, however, excluding those employees from work comes with substantial risk. In light of this risk, employers should consider whether an executive order or some other legal decree may prevent vulnerable employees from re-entering the workplace or from working outside of their homes during the COVID-19 pandemic. If this is the case, careful legal analysis should be conducted to determine whether such order or decree has the effect of being enforced as a law and how that interacts with the ADA and applicable state or local disability laws, particularly if the employee is unable to telework. Finally, though an employer may be tempted to request that employees reveal if they have an underlying condition placing them among those considered to be most vulnerable to COVID-19, the Equal Employment Opportunity Commission's Guidance on Pandemic Preparedness in the Workplace and the Americans with Disabilities Act ("Pandemic

Guidance") states that required employee disclosures of a compromised immune system or chronic health condition that could make them more susceptible to complications are prohibited under the ADA. Further, the EEOC's COVID-19 questions and answers, as well as its Pandemic Guidance, limit employer inquiries to whether someone has COVID-19 symptoms or COVID-19 itself to assess whether the employee poses a direct threat.

CDC Provides Additional Advice for Temperature Screenings

In an April 20, 2020, update to its General Business Frequently Asked Questions, the U.S. Centers for Disease Control and Prevention (CDC) included some advice to employers on how to conduct employee temperature screens. While noting that there are several methods employers could utilize to conduct temperature screenings, the CDC provides three particular examples for employers to consider:

1. Social Distancing - Under this example, the CDC suggests that employers could structure screenings in a way that fully maintains social distancing. Employees would take their own temperatures before work or upon arrival. The person conducting the screening upon the employee's arrival to work would stay at least six feet away from the employee at all times while (a) asking the employee to confirm verbally that the employee's temperature is less than 100.4° F and that the employee is not coughing or experiencing shortness of breath; and (b) "making a visual inspection of the employee for signs of illness, which could include flushed cheeks or fatigue." Under this approach, the CDC states that screening personnel "do not need to wear personal protective equipment (PPE) if they can maintain a distance of 6 feet."

2. Barrier/Partition Controls - Under this approach, screening personnel would "stand behind a physical barrier, such as a glass or plastic window or partition, that can protect the screener's face and mucous membranes from respiratory droplets that may be produced when the employee sneezes, coughs, or talks." The CDC recommends that "the screener should wash hands with soap and water for at least 20 seconds" (or use an alcohol-based hand sanitizer with at least 60 percent alcohol) upon arrival. When screening employees, the screener would "make a visual inspection of the employee for signs of illness" and check the employee's temperature with a thermometer. In this scenario, the CDC recommends the screener measure the employee's temperature using the following steps:

A. put on disposable gloves;
B. reach around the partition (or through a hole in the partition) to use the thermometer but while keeping the screener's face behind the partition at all times;
C. use a clean pair of gloves between each employee *unless* the screener is using a disposable or non-contact thermometer and did not have physical contact with the employee;
D. clean and disinfect thermometers in accordance with manufacturing instructions and any facility policies;
E. remove and discard all PPE (e.g., gloves) and wash hands with soap and water for at least 20 seconds (or use a hand sanitizer with at least 60 percent alcohol).

3. PPE - Where social distancing is not maintained and there is not a physical partition in place as with the above examples, the CDC states that screeners could visually inspect employees and measure their temperatures using the same procedures as outlined in the barrier/partition approach above, except wearing additional PPE for each screening. Specifically, the CDC advises the screener to "put on a facemask, eye protection (goggles or disposable face shield that fully covers the front and sides of the face), and a single pair of disposable gloves." The CDC notes that a "gown could be considered if extensive contact with an employee is anticipated." The CDC states the PPE should be removed and discarded after each screening, and screeners then should wash their hands for at least 20 seconds with soap and water (or use a hand sanitizer with at least 60 percent alcohol). As employee temperature screening becomes more common across the country, employers may see differing or more detailed

recommendations from state and local public health authorities, which should be considered when determining the company's screening protocols.

Form I-9: Covid-19 Temporary Policy for List B Identity Documents

Because many areas are under stay-at-home orders due to Covid-19 and some online renewal services have restrictions, employees may experience challenges renewing a state driver's license, a state identification card, or other Form I-9, Employment Eligibility Verification, List B identity documents. Therefore, the U.S. Department of Homeland Security is issuing a temporary policy regarding expired List B identity documents used to complete Form I-9. Beginning on May 1, 2020, identity documents found in List B set to expire on or after March 1, 2020, and not otherwise extended by the issuing authority, may be treated the same as if the employee presented a valid receipt for an acceptable document for Form I-9 purposes.

When your employee provides an acceptable expired List B document that has not been extended by the issuing authority you should record the document information in Section 2 under List B, as applicable; and enter the word "Covid-19" in the Additional Information Field. Within 90 days after DHS' termination of this temporary policy, the employee will be required to present a valid unexpired document to replace the expired document presented when he or she initially was hired. It is best if the employee can present the replacement of the actual document that was expired, but if necessary, the employee may choose to present a different List A or List B document or documents and record the new document information in the Additional Information Field.

Wave of COVID-19 Litigation Already Rising, Threatening Employers as They Return to Work

The wave of COVID-19 litigation is not coming; it has arrived. Even before most states open back up for business, plaintiff's lawyers are suing employers for a variety of alleged violations related to the virus, including discrimination, workplace safety violations, and unpaid overtime. Notably, the volume of these filings has begun to accelerate sharply. Employers should prepare themselves now for the deluge. COVID-19 has devastated the labor market. As the pandemic seized the country, employers across the country took unprecedented actions to save their businesses. They closed shops, reduced salaries, and laid off workers in record numbers. The scale of these efforts can be seen in the unemployment figures: in the first seven weeks of the crisis, more than 33 million people filed new claims. Roughly one in five people who were working before the pandemic are now unemployed. This disturbance in the labor market is already generating lawsuits. From March 17 to May 2, 2020, plaintiff's lawyers filed almost 30 complaints related to COVID-19 in federal court. That number is perhaps small in comparison to the scope of the crisis, but the trend points sharply upward. While only seven cases were filed in March, 22 were filed in April—an increase of more than 215%. These lawsuits give a preview of what claims could be expected. Eight lawsuits allege violations related to leaves of absence, six raise claims for discrimination and harassment, five for wage-and-hour violations, three for workplace safety, three for constitutional and civil rights issues, and two each for business restructuring and labor relations violations. So far, many of the filings are concentrated in states with stringent employment regulations, including California, New York, and Illinois. Leading the pack, however, is Florida, in which five COVID-19-related lawsuits have been filed. The complaints vary, but they reveal several trends. For example, many plaintiffs are claiming that employers are doing too little to protect employees from exposure. They claim that employers should be providing more protective equipment, staggering shifts, and limiting contact with customers, among other things. Other plaintiffs are targeting employers for allegedly failing to pay COVID-19-related overtime; for example, by failing to pay for time spent putting on and taking off protective equipment. Still others are alleging that employers are retaliating against

employees for complaining about dangerous working conditions. These complaints come on top of those already filed in state courts, where plaintiffs are raising similar claims. For example, several plaintiffs have sued companies for classifying them as independent contractors and thus, allegedly, denying them paid sick leave under state law. Other plaintiffs have attacked employers for failing to follow the CDC's recommendations for social distancing in the workplace, thus allegedly exposing them unnecessarily to the virus. For employers already facing an uncertain business climate, these lawsuits are potentially devastating. They could force employers to field a variety of claims ranging from discrimination to workplace safety. Some lawmakers have recognized the problems facing employers and are starting to react. More than a dozen states have adopted laws limiting COVID-19-related liability for healthcare providers. Others are considering extending liability shields to manufacturers of equipment used to fight the pandemic. And at least one state, Utah, has gone further, enacting a law to limit property owners' exposure to COVID-19 lawsuits. The law requires plaintiffs to prove that the owners recklessly or intentionally injured them, not just that the owners acted negligently. Congressional Republicans are pushing for similar legislation at the federal level. Sen. Mitch McConnell (R-Ky.) has said that liability shields are a "red line" in negotiations over the next round of coronavirus relief. Democrats, however, have so far resisted the idea, as have major labor unions.

EEOC Interprets ADA Coverage for Individuals at Higher Risk of Contracting COVID-19

In a series of guidance issued since May 5, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) addressed protections under the Americans with Disabilities Act (ADA) for workers who are at higher risk of severe illness from COVID-19, clarified when such individuals may be excluded from the workplace, and shared examples of accommodations that could reduce COVID-19 related risks to these employees.

Higher-Risk Individuals May Request Accommodations
In its guidance, the EEOC confirms that employees may request reasonable accommodations if the U.S. Centers for Disease Control and Prevention (CDC) deems them "higher risk" for severe illness from COVID-19. These higher-risk groups include:

- People age 65 years and older;
- People who live in a nursing home or long-term care facility; and
- People of all ages with underlying medical conditions, particularly if not well controlled, including:
    - People with chronic lung disease or moderate to severe asthma;
    - People who have serious heart conditions;
    - People who are "immunocompromised;"
    - People with severe obesity (body mass index [BMI] of 40 or higher);
    - People with diabetes;
    - People with chronic kidney disease undergoing dialysis; and
    - People with liver disease.

Employees in these categories may request an accommodation related to their underlying medical condition. Employers receiving such requests should engage these employees in the interactive process, including asking questions or seeking medical documentation to determine whether the individual has a disability and whether there is a reasonable accommodation, barring an undue hardship (*i.e.*, significant difficulty or expense), that would reduce their risk of contracting COVID-19.

Employers May Bar Higher-Risk Employees from the Workplace if They Pose a Direct Threat Despite Accommodation
The EEOC withdrew its original guidance on this point and reissued it on May 7, 2020, because it allegedly had been misinterpreted to permit employers to bar employees from working during

the COVID-19 pandemic if they reasonably believed employees' underlying medical conditions would pose a "direct threat" to the workers' health. The EEOC has now clarified that these "higher risk" individuals can be excluded from work only if their disability poses a "direct threat" to their health *that cannot be eliminated or reduced by reasonable accommodation*.

As explained in the guidance, the direct threat defense "requires an employer to show that the individual has a disability that poses a 'significant risk of substantial harm' to [their] own health under 29 C.F.R. section 1630.2(r)." The direct threat assessment must be individualized, and the employer should consider the severity of the pandemic in the geographic area where the employee works, the employee's health condition, the particular job duties and likelihood of exposure at work, and any protective measures the employer is taking to slow the spread of COVID-19. Even if an employer determines that an employee's condition poses a direct threat, the employer nonetheless cannot exclude the employee from work (or take other adverse action) unless there is *no way* to provide the employee a reasonable accommodation that would eliminate or reduce the risk so the employee could safely perform their essential job duties at work.

Employers and Employees Are Encouraged to be "Creative and Flexible" with Accommodations

Finally, the EEOC provided several examples of accommodations that could eliminate or sufficiently reduce the direct threat that exists for these higher-risk employees at work. Such accommodations could include:

- providing protective gear that would not normally be required for the employee's job;
- taking protective measures such as creating additional space or installing barriers between an employee with a disability and others at the workplace;
- removing discrete, non-essential functions of employees' jobs;
- modifying work schedules to decrease contact with coworkers and/or the public (when on duty or commuting); or
- rearranging workspaces or "moving the location where one performs work . . . if that provides more social distancing."

The EEOC encourages employees and employers to think beyond these examples and be "creative and flexible" in evaluating and developing reasonable accommodations during the pandemic. So what does this guidance mean for employers? At least for the duration of the COVID-19 pandemic, the EEOC's guidance apparently broadens the ADA's protections to cover individuals with pre-existing medical conditions, even if they currently do not have a "disability" as that term is used under the act. The guidance requires employers to engage these employees in the interactive process and provide reasonable accommodations absent undue hardship. Employers should be prepared for the potentially increased need to spend time, resources and finances to work with a greater number of employees to determine and implement effective work adjustments so they will not pose a direct threat of harm to themselves due to their underlying medical conditions. Depending on the circumstances, employers may find that fewer employees are able to return to work, or remain at full capacity or in their original roles, for the foreseeable future.

For employees who have been able to perform the essential functions of their position while teleworking during the pandemic, employers may wish to continue allowing higher-risk individuals to continue to telework for an additional period beyond a worksite reopening. Due to the complexity and evolving nature of this issue, businesses should consult with competent employment law counsel regarding compliance with legal requirements for engaging employees in the interactive process, granting accommodations, or excluding higher-risk employees during the COVID-19 pandemic.

Sources: Littler; Houston Business Journal; Houston Chronicle; Greater Houston Partnership; Wall Street Journal; Bloomberg